EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (INSOLVENCY FUNCTIONS) ORDER 2017

2017 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this Order is to confer mutual functions on the Scottish Ministers and a Minister of the Crown, in or as regards Scotland, so that both have the power to bring forward, as appropriate, winding up rules or regulations for Scotland in relation to any companies, incorporated friendly societies or limited liability partnerships, irrespective of whether these rules or regulations relate to reserved matters under Schedule 5 of the Scotland Act 1998 ("the 1998 Act") or matters that are not reserved.

2.2 The Order also provides for the parliamentary procedure in the Scottish Parliament that will be applicable to any rules or regulations made by the Scottish Ministers under any functions which are conferred on them by virtue of the Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland.

4. Legislative Context

4.1 The Scotland Act 1998 (Insolvency Functions) Order 2017 will be made in exercise of the powers conferred by section 63 and section 108 of the 1998 Act. This instrument is subject to affirmative resolution procedure in the UK and Scottish Parliaments, and will be made by Her Majesty in Council.

4.2 Section 63(1)(b) of the 1998 Act enables an order to provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable by the Scottish Ministers concurrently with the Minister of the Crown. This Order will enable the Scottish Ministers to exercise rule and regulation making powers under: (i) section 411(1)(b) and (2) of the Insolvency Act 1986 ("the 1986 Act") in relation to the winding up of companies; (ii) section 411(1)(b) and (2) of the 1986 Act, as applied by section 23 and paragraph 69(1)(a) of Schedule 10 to the Friendly Societies Act 1992, in relation to incorporated friendly societies; and (iii) sections 14(2)(a), 16 and 17(1), (2) and (3) of the Limited Liability Partnerships Act 2000 in relation to limited liability partnerships. The Scottish Ministers will only be able to exercise these functions with the agreement of a Minister of the Crown. The

Scottish Ministers will be able to exercise these functions concurrently with a Minister of the Crown (insofar as these are exercisable in or as regards Scotland).

4.3 Section 108(1)(b) of the 1998 Act enables an order to provide for any functions, so far as they are exercisable by a member of the Scottish Government, to be exercisable by a Minister of the Crown concurrently with a member of the Scottish Government. This Order enables a Minister of the Crown to exercise rule and regulation making powers under: (i) section 411(1)(b) and (2) of the 1986 Act in relation to the winding up of companies; (ii) section 411(1)(b) and (2) of the 1986 Act, as applied by section 23 and paragraph 69(1)(a) of Schedule 10 to the Friendly Societies Act 1992, in relation to incorporated friendly societies and (iii) sections 14(2)(a), 16 and 17(1), (2) and (3) of the Limited Liability Partnerships Act 2000 in relation to limited liability partnerships. A Minister of the Crown will only be able to exercise these functions with the agreement of a member of the Scottish Government. A Minister of the Crown will be able to exercise these functions concurrently with the Scottish Ministers.

4.4 This Order also expressly sets out what parliamentary procedure will apply in the Scottish Parliament in relation to any new rule making or regulation making powers which are conferred on the Scottish Ministers by virtue of article 2. It is not necessary to make reciprocal provision in relation to parliamentary procedure in the UK Parliament for any functions which the Scottish Ministers confer on a Minister of the Crown by virtue of article 5. The relevant enactments under which the functions will exercised by a Minister of the Crown, in or as regards Scotland, already make such provision about the applicable parliamentary procedure which will become operative when the powers are used.

5. Extent and Territorial Application

5.1 The instrument extends to Scotland, England and Wales.

5.2 The territorial application of this instrument is Scotland, England and Wales.

6. European Convention on Human Rights

6.1 The Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Scotland Act 1998 (Insolvency Functions) Order 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 This Order is part of a package of measures aimed at updating and modernising corporate insolvency in Scotland; in particular, insolvency rules for companies (currently the Insolvency (Scotland) Rules 1986).

7.2 The law on winding up in Scotland is complex given it is a mixed area of competence. In particular Section C2 of Schedule 5 of the 1998 Act provides that, in relation to business associations, the "general legal effect" of winding up is reserved but that the "process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part" is excepted from this reservation. It is not always clear whether a winding up matter can be said to

relate to the "general legal effect of winding up" or whether it falls within the exception of "the process of winding up".

7.3 Accordingly, rather than attempt a complicated exercise of trying to assess, as part of the modernisation process, which rules relate to a reserved matter and which do not, this Order provides for the mutual conferral of functions on a Minister of the Crown and Scottish Ministers under sections 63 and 108 of the 1998 Act so each can make winding up rules for company insolvency in Scotland, irrespective of whether those rules relate to reserved matters or not. It is also proposed that similar functions should be mutually conferred on each administration to enable it to make provision as appropriate by rules or regulations in relation to winding up of incorporated friendly societies and limited liability partnerships in Scotland.

7.4 This approach makes it clear that each administration has the power to make, in exercise of these powers, all subordinate legislation provision on winding up matters without any doubts being cast on the scope of the relevant enabling powers. For users of the legislation, it also supports the aim that the rules on winding up of companies for Scotland will as, part of the modernisation process, be contained in one instrument rather than split between two.

Consolidation

7.5 This Order stands alone.

8. Consultation outcome

8.1 Formal consultation is not considered necessary given that the purpose of this Order is to set the framework for modernising subordinate legislation provision on winding up.

8.2 Informal representations from insolvency practitioners, their industry body and regulators indicate that the proposed modernisation has strong stakeholder support as does the proposal to facilitate Scottish rules on winding up of companies being contained in a single instrument.

9. Guidance

9.1 This Order stands alone.

10. Impact

10.1 The impact on business, charities or voluntary bodies is deemed to be positive given that the aim of this Order is that the modernisation process can be taken forward so that those with an interest in winding up proceedings will refer to one set of rules on company winding up rather than two.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The Order itself will not have a direct impact on the activities undertaken by small businesses, but the new Scottish Insolvency Rules, that will reflect the mutual conferral of functions provided for in the Order, will be applicable to such businesses. Modernisation of the Scottish Rules on winding up of companies will include the incorporation of policy changes arising from the Small Business, Enterprise and

Employment Act 2015 which will improve the efficiency of insolvency procedures and enable more money to be returned to creditors.

12. Monitoring & review

12.1 Although this is the first time that a section 63 and section 108 Order will be combined, in respect of insolvency it is not thought to be contentious and no monitoring or review of the effects of this Order are deemed to be required.

13. Contact

13.1 Alastair Noble at the Scotland Office (Telephone: 0207 270 6771 or email: Alastair.Noble@scotlandoffice.gsi.gov.uk can answer any queries regarding the instrument.